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OOI TEIK BENG

v.

DR. EE CHONG SEN & ANOR.

HIGH COURT MALAYA, PENANG

MOHAMED DZAIDDIN J

b

[ORIGINATING MOTION NO. 32-38 OF 1988]

13 JANUARY 1989

ADMINISTRATIVE LAW: *Judicial review - Application for order of certiorari to quash the decision of the Committee of Squash Rackets Association of Penang - Whether such remedy available against the committee - Questions to be considered.*

c

The applicant applied by way of notice of motion for an order of *certiorari* to quash the decision of the Committee of Squash Rackets Association of Penang made on 1 May 1988 which dismissed the applicant's appeal against an award of a walkover given by the referee and tournament director in the final of the Division A of the Penang Squash League Competition held on 23 April 1988.

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The applicant also applied for an order of *mandamus* that the committee be compelled to hear the applicant's appeal according to law but this prayer was withdrawn by the applicant's Counsel at the hearing.

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Counsel for the respondent argued that the remedy of *certiorari* did not apply to the committee in this case as they were merely a private organisation which did not have any public law element. Counsel for applicants alleged that the committee possessed a public element.

Held:*f*

[1] *Certiorari* being a form of judicial review is confirmed to reviewing activities of a public nature or possessing public law element as opposed to activities of a purely private or domestic character. In deciding this question it was necessary to consider both the source of the decision making power of the organisation and the nature of the power.

[2] On the facts of the present case there was no public element in the committee and the committee owes no duty to the public at large. As such the applicant cannot challenge the decision of the committee by way of judicial review.

[Application dismissed with costs.]

*g***Cases referred to:**

O.S.K. & Partners Sdn. v. Tengku Noone Aziz & Anor. [1983] CLJ (Rep) 317

Ganda Oil Industries Sdn. Bhd. & 10 Ors. v. K.L. Commodity Exchange & Anor. [1988] 1 CLJ (Rep) 56

Armstrong v. Cane [1964] NZLR 369

Reg v. Criminal Injuries Compensation Board, Ex parte Lain [1967] 2 QB 864

h

Council of Civil Service Union v. Minister for the Civil Service (GCHQ case) [1985] AC 374

For the applicant - Gan Teik Chee; M/s. Gan Teik Chee & Co.

For the respondent - Foo Say Keow; M/s. Murad & Leong

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JUDGMENT

Mohamed Dzaiddin J:

Decision on Encl. 13

By this notice of motion, the applicant sought an order of *certiorari* to remove to this Court for the purpose of it being quashed the decision of the Committee of Squash Rackets Association of Penang (“SRAP”) made on 1 May 1988, in which the said committee dismissed the applicant’s appeal against an award of a walkover given by the referee and tournament director in the final of the Division A of the Penang Squash League Competition 1988 held on 23 April 1988.

The applicant also prayed for an order of *mandamus* that the said committee of SRAP do hear and determine the applicant’s appeal of 25 April 1988 according to law.

The Facts:

It is convenient to state briefly what happened at the finals of the SRAP League 1988 held on 23 April last year at the Pepsi Squash Centre, Bukit Dumbar, Pulau Pinang. The Division A final was between Northern Telecom Team (“NT Team”) and the Komtar Team. It seemed that when the first rubber, (meaning a match of three games) had been completed, the 2nd player for the Komtar Team, Choo Chuan Lee, apparently failed to turn up for the second rubber. After about 15 minutes, the referee, Mr. S.T. Oh, and the tournament director, Dr. Ee Chong Sen, decided to award a walkover to the NT Team. The decision was announced to all players, supporters and spectators present. That being the position, the NT Team thought that they had won the final with a walkover. The two teams then continued to play the 3rd and 4th rubbers, in order not to disappoint the spectators. Hey presto! Here comes the surprise. When the two players for the 3rd rubber was about to commence play, the said Choo Chuan Lee appeared on the scene. The captain of the Komtar Team quickly appealed to the referee and the tournament director to cancel their decision of the walkover given earlier to the NT Team and requested that the final be resumed. In the meantime, the said referee and tournament director allowed the 3rd and 4th rubbers to proceed, again giving the NT Team the impression that they were merely playing friendly games.

When the 4th rubber had been completed, the referee and the tournament director ordered the two players of the 2nd rubber, i.e. the said Choo Chuan Lee, and his opponent from the NT Team to commence play. It was at this stage that the applicant team realised that the earlier walkover decision in their favour had been cancelled and that the final with the order of play would continue. Being dissatisfied with the said decision of the referee and the tournament director, the NT Team protested and at the same time the players refused to continue play. In the result, a second walkover was awarded in favour of the Komtar Team. In short, the Komtar Team was declared the winner and champion of the 1988 Division A League Competition.

On 25 April 1988 the NT Team captain wrote formally to the chairman of the SRAP protesting against the decision of the referee and the tournament director made on 23 April 1988. On 1 May 1988, the SRAP held its fourth committee meeting where it discussed the applicant’s letter. After deliberation, the committee rejected the appeal on the ground that the NT Team had failed to play the remaining rubbers under protest as required by r. 5 of the Competition Bye-laws. Hence, by this present application, the applicant has sought an order of *certiorari* to quash the decision of the SRAP committee made on 1 May 1988.

- a** The application, which is supported by an affidavit of Mr. Ooi Teik Beng, who is the registered public officer of the NT Club appears to be based on two principal grounds. First, it is said that the referee and the tournament director had acted in excess of their powers under the League Competition Bye-laws ("Bye-laws") when they overruled their own decision made previously. The applicant contended that r. 5 of the Bye-laws (which states that in the event of any dispute, the match shall be played under protest) had no application to this case.
- b** The second ground was that the committee was in breach of the rule of natural justice because Dr. Ee Chong Sen, the tournament director, Mr. S.T. Oh, the referee, and one Mr. Roger Ng, being interested parties in this matter were present and participated in the deliberation and decision-making at the said committee meeting.

- c** In reply, Mr. Gitu Chakravarthy s/o S. Chakravarthy affirmed an affidavit on behalf of the SRAP. In essence, he refuted the allegation of facts made in the affidavit of Ooi Teik Seng, and at the same time, maintained that the applicant had no case because of non-compliance with r. 5 of the Bye-laws. Secondly, he contended that the applicant cannot apply for an order of *certiorari* when he had not exhausted his domestic remedy under r. 55 of Rules and Constitution of the Persatuan Squash Malaysia (SRAM), the parent body of SRAP, which reads as follows:

- d** In the event of any dispute between either:

- (a) the Association and a State Branch
- (b) a State Branch and another State Branch, or
- (c) a member and a State Branch

- e** the matter of the dispute shall be referred to the management committee of the Association whose decision shall be final.

- f** Encik Foo Say Keow, Counsel for the respondents, raised one other point, which to my mind is of fundamental importance to this application and does require some discussion. Counsel submitted that both *certiorari* and *mandamus* could not lie against the SRAP because it is purely a private organisation which has no public law element. He relied on *OSK & Partners Sdn. v. Tengku Noone Aziz & Anor.* [1983] CLJ (Rep) 317 and *Ganda Oil Industries Sdn. Bhd. & 10 Ors. v. K.L. Commodity Exchange & Anor.* [1988] 1 CLJ (Rep) 56. With regard to an order of *mandamus*, he submitted that it would only lie against a body exercising public duty.

- g** Encik Gan Teik Chee, Counsel for the applicant, was simplistic in his reply on the point regarding *certiorari*. He submitted that there was "a public element" in the SRAP. As regards *mandamus*, Counsel quite rightly conceded that it could not lie against the committee of SRAP and immediately applied for a withdrawal of prayer 2 of the application. Needless to say, it is settled that *mandamus* will only lie against any person, corporation, or inferior tribunal exercising public duty. (*Armstrong v. Cane* [1964] NZLR 369).

- h** Now, reverting to the issue of *certiorari*, the crucial question to be determined is whether it lies against a domestic tribunal such as the committee of SRAP.

The Law:

- i** At the outset, I wish to state that I do not propose to go through a series of authorities to find out what the law is. It is only necessary for me to confine myself in finding out from these authorities whether judicial review is available against domestic tribunal like SRAP. I should start off by quoting a passage from the judgment of Lord Parker CJ in *Reg v. Criminal Injuries Compensation Board, Ex parte Lain*: [1967] 2 QB 864.

The position as I see it is that the exact limits of the ancient remedy by way of *certiorari* have never been and ought not to be specifically defined. They have varied from time to time being extended to meet changing conditions. At one time the writ only went to an inferior Court. Later its ambit was extended to statutory tribunals determining a *lis inter partes*. Later again it extended to cases where there was no *lis* in the strict sense of the word but where immediate or subsequent rights of a citizen were affected. The only constant limits throughout were that it was performing a public duty. Private or domestic tribunals have always been outside the scope of *certiorari* since their authority is derived solely from contract, that is, from the agreement of the parties concerned.

It must, however, be noted that in *Ex parte Lain (supra)* the Court of Appeal held that the Compensation Board was not purely of private or domestic character, but contained public element as the compensation scheme was promulgated under powers for the purpose of compensating victims of crimes of violence by way of *ex gratia* payments. Moreover, the board has powers to determine matters affecting subjects, and therefore has a duty to act judicially.

In *Ganda Oil Industries Sdn. Bhd. (supra)* the Supreme Court had to determine whether the Kuala Lumpur Commodity Exchange was a public body whose decision was subject to judicial review. Tan Sri Hashim Yeop Sani, SCJ examined several authorities to discover how far *certiorari* would apply to a public body like the Kuala Lumpur Commodity Exchange. Delivering the decision of the Court, the learned Judge stated at p. 62:

In the instant case Ministerial control is only in respect of policy matters and not the day to day administration and business of the Exchange. The relationship between the parties who are members of the Exchange are clearly contractual and the exercise of the power of the KLCE under reg. 11 of the General Regulations is also an exercise of a power derived under the contract. The act which is the subject of the challenge is by its nature not and should not in our view be made amenable to judicial review.

The learned Judge referred to the landmark decision of the House of Lords in *Council of Civil Service Union v. Minister for the Civil Service* (GCHO case) [1985] AC 374. I find the speech of Lord Diplock, at p. 409 particularly helpful and I now quote:

For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead, to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph. The ultimate source of the decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself...

The then Federal Court had also an occasion to consider similar issue as affecting the decision of the committee of Kuala Lumpur Stock Exchange. In *OSK & Partners Sdn. v. Tengku Noone Aziz & Anor. (supra)*, the appellant, a member of the Kuala Lumpur Stock Exchange ("KLSE") applied to the High Court for an order of *certiorari* to quash the decision of the Kuala Lumpur Stock Exchange Committee imposing a fine of RM15,000 under art. 27 of the articles of association of KLSE for alleged breach of rules of the Exchange. The grounds were that the said decision was made in excess of jurisdiction, contrary to natural justice and that the KLSE was wrong in law in its interpretation of the Rules. A preliminary question was raised on whether the KLSE was a body to which *certiorari* would lie. Hashim Yeop Abdullah Sani J (as he then was) held that KLSE was a private body, the relationship between parties being strictly contractual in nature. He further held that the committee was not under

- a* any express or implied duty to act judicially when exercising its disciplinary powers and the functions of the KLSE was not in any way manifestly public in nature. He therefore, dismissed the appellant's application.

- b* On appeal, the Federal Court (allowing the appeal) held that the prerogative orders may be applicable to decision of bodies owing their powers solely to contract, provided their powers although contractual are infused with public element. Abdoolcader J (as he then was) delivering the judgment of the Court dealt in greater details on the law of judicial review (which I must confess I need not repeat them here). Suffice to say that on the authorities cited by the learned Judge, again citing the words of Lord Parker CJ, in *Ex parte Lain*, (*supra*) that the exact limits of *certiorari* have never been and ought not to be specifically defined as they have varied from time to time being extended to meet changing conditions, and the only constant limits throughout were that the tribunal was performing a public duty. Therefore, in
- c* the case of KLSE, the learned Judge held at p. 323:

The committee which is responsible for the management of the affairs of the Exchange is accordingly a body of persons having legal authority to determine the rights of persons licensed under the Act to carry on business as stock brokers and it follows that in purporting to exercise its disciplinary functions it necessarily has the duty to act judicially in the deposition of that power and it is therefore subject to judicial review by way of *certiorari* and prohibition.

- d* From the authorities it is clear to me that *certiorari*, being a form of judicial review, is confined to reviewing activities of a public nature or possessing public law element as opposed to activities of a purely private or domestic character. This means that a decision to be susceptible to judicial review must be empowered by public law. According to Lord Diplock in *GCHQ* the ultimate source of decision-making power is nearly always a statute or subordinate legislation. However, Tan Sri Hashim in *Ganda Oil Industries. Sdn. Bhd. & 10*
- e* *Ors. v. K.L. Commodity Exchange & Anor.* (*supra*), after reviewing the authorities felt that it would be useful to consider not just the source of power as the sole test, but it would also be useful to look at the nature of the power. Thus, if the body in question is exercising public law functions or if the exercise of its functions has public law consequence, then that would certainly be sufficient to bring the body within reach of judicial review but not
- f* otherwise. (*ibid* p. 61.)

- Clearly, what is sought to be attacked in the present application was the decision of the committee made on 1 May 1988 dismissing the applicant's protest regarding the walkover. A question asked is: where does the committee derive its power to make the said decision? The answer is quite simply, from the rules and constitution of the national body, SRAM, whose main objects is to promote and popularise the game of squash racquet in Malaysia.
- g* The association's rules and constitution also provide for the formation of branches in all states of Malaysia, which shall be managed by a branch management committee in accordance with the rules laid down by the association in its general meeting and registered with the Registrar of Societies. Further, the rules provide for two categories of membership in the State Branch, comprising of individual and affiliated members. It is undisputed that both the applicant and the Komtar Team are members of the Penang Branch. One of the functions of
- h* management committee is to hear and decide any dispute arising between a member and State Branch. It follows that the authority of the management committee to make its decision derived exclusively from the rules and constitution which is a contract between the SRAP and its members. I find there is nothing to suggest that the SRAP owes any duty to the public at large insofar as the committee's decision was concerned. Perhaps, its decision might have created public interest, in particular squash enthusiasts, but its powers in relation to the
- i* matter in the present application is concerned are derived from the contract i.e. the

association's rules and constitution. In short, the committee did not perform any public duty at all, but functioned as a domestic tribunal to adjudicate on a matter or issue of a contractual nature.

Following the principles of law established in the cases cited above, in my judgment, the applicant cannot challenge the decision of the committee of SRAP by way of judicial review. In another word, *certiorari* does lie against the respondents. Accordingly, this application is dismissed with costs.

Perhaps, the course opened to the applicant was to file an action by writ for a declaratory judgment under O. 15 r. 16 of the Rules of the High Court 1980. Even so, the applicant would still have to wait until it exhausts its domestic remedy under r. 55 of the association's rules and constitution before it could proceed against the respondents.

Finally, in view of my judgment, I do not propose to consider and decide the two grounds raised by the applicant in seeking for an order of *certiorari*.

Also found at [1989] 2 CLJ 454

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